

EH-41 WETLANDS UPDATE

Posted May 22, 1998

Background: DOE and Federal Wetlands Requirements

The concept of a wetland is straightforward—it is an area transitional between dry land and open water. Because wetlands are environmentally valuable they have been the subject of various regulatory programs which may limit activities affecting them. The exact definition of what areas are wetlands, and thus potentially subject to regulation, is of great importance. The Clean Water Act (CWA), Section 404, for instance, regulates the discharge of dredged and fill materials into U.S. waters, including wetlands. The regulatory definition of wetlands is "Areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." [33 *Code of Federal Regulations* (CFR) 328.3, 40 CFR 230.3]. Placing exact bounds on what is and is not a wetland, as well as what does or does not constitute discharge of dredged or fill materials, has been subject to great controversy. Regulated activities are controlled by a permit review process. The U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly administer the federal wetlands program.

Before the U.S. Department of Energy (DOE) takes any action in a wetland for which a permit may be required, however, other regulatory requirements trigger detailed consideration and preservation of wetland values. DOE regulations at 10 CFR 1022 (titled Compliance With Floodplain/Wetlands Environmental Review Requirements) which implement Executive Orders 11988 and 11990 for floodplain management and wetland protection, require that any action in a wetland or floodplain must be undertaken in a manner that minimizes destruction, loss, or degradation of wetlands. Before the action, a floodplain/wetlands assessment must be prepared which describes the action, its effects, and alternatives considered. This is followed by a public review period during which federal and state regulatory agencies, such as EPA and the Corps, are notified of the proposed action and given the opportunity to comment. At the close of the comment period, DOE must reevaluate the action taking into account all comments received. If there is no practicable alternative to locating in wetlands or a floodplain, then DOE must design or modify the action to minimize potential harm to or within the wetlands or floodplain. To the extent possible, this review is carried out as part of the NEPA process.

Further, if the action involves discharge of dredged or fill materials in a wetland, then in addition to the requirements outlined above, a permit, either individual or general, from the Corps under Section 404 may be required (33 CFR 323). The Corps specifies the site of the discharge by applying guidelines known as the Section 404(b)(1) Guidelines, promulgated by EPA (40 CFR 230). EPA has the power to prohibit or limit the use of a proposed disposal site under its regulations at 40 CFR 231. Individual permits requiring a case-by-case evaluation are used to address certain actions which have the potential for significant environmental impacts. General permits are issued on a state, regional, or nationwide basis (for a period not to exceed five years) for dredge and fill actions that are similar in nature and cause only minimal individual and cumulative impacts. Nationwide permits (NWPs) are a type of general permit for classes of activities having minimal impacts and are designed to be self-executing and involve little, if any, delay or paperwork (33 CFR 330). In addition, some classes of actions which may occur in wetlands are exempt from any Section 404 permit requirements (33 CFR 323.4). Regardless of whether a Section 404 permit of any type is required, the DOE floodplain/wetlands environmental review requirements at 10 CFR 1022 will apply and will require minimization of harm for any action in an area meeting the regulatory definition of a wetland.

Update on Wetlands Requirements

The President's Wetland Plan

On August 23, 1993, the Clinton Administration's Task Force on Wetlands issued a policy statement entitled "Protecting America's Wetlands: A Fair, Flexible, And Effective Approach" [available on the World Wide Web (WWW) at <http://www.wetlands.com/fed/aug93wet.htm>]. Recognizing that wetlands perform many functions important to society such as improving water quality, recharging groundwater, providing natural flood control, and supporting fish, wildlife, and plants; the stated purpose of the policy positions outlined in the paper is to support the effective protection and restoration of wetlands, while advocating reforms to increase fairness and flexibility of federal regulatory programs.

The Clinton plan reviewed the controversy surrounding the manuals that federal agencies use in the field to delineate wetlands. The Corps had issued its own 1987 Wetlands Delineation Manual for determining the bounds of jurisdictional wetlands based on a three-parameter scientific approach using soils, plants, and hydrology. An attempt by the Corps, EPA, Fish and Wildlife Service, and Soil Conservation Service (since renamed the Natural Resources Conservation Service) to develop a set of common procedures to identify wetlands resulted in the 1989 Interagency Wetlands Delineation Manual. Critics claimed this 1989 manual significantly expanded regulatory jurisdiction without an opportunity for public participation. In response, the Bush Administration revised the 1989 manual and produced a 1991 manual which was correspondingly criticized for erring in the opposite direction and reducing too far the amount of wetlands subject to protection. In an attempt to resolve the controversy, the Clinton plan supports the use of the 1987 manual by all agencies. With certain modifications, the 1987 manual has since become the most commonly used guide to delineation.

The Clinton plan sought to address not only what a wetland is, but also the criticism that the Section 404 permit process is inflexible to the extent that "all wetlands are treated the same" from a regulatory perspective. To clarify that small projects with minor impacts are subject to less rigorous permit review than larger projects with substantial impacts, EPA and the Corps issued guidance on flexibility afforded by the 404(b)(1) Guidelines concerning project alternatives and impacts of proposed discharges. They stated that development of a new approach for wetland functional assessment, known as the Hydrogeomorphic Classification System (HGM), would be expedited. HGM would assist the agencies in assessing the relative severity of the environmental impact of proposed discharges to determine a proportional regulatory response consistent with the flexibility in the 404(b)(1) Guidelines.

HGM Approach

On August 16, 1996, the Corps published a notice of intent and request for comments on the National Action Plan to develop the HGM Approach [61 *Federal Register (FR)* 42593]. HGM is based on three fundamental factors critical to the functioning of wetlands: position in the landscape (geomorphic setting), water source (hydrology), and the flow and fluctuation of water once it is in the wetland (hydrodynamics). It is being developed in three phases and is to be completed in 1998. The primary goal is to have a standardized assessment methodology that can be applied consistently in a diversity of wetland types across the United States, is based on the best available technical information, and maintains compatibility with the time and resource framework of the Section 404 Program. The HGM approach is to (1) help determine the nature and level of any compensatory mitigation that may be needed, (2) support mitigation banking, and (3) support planning within watersheds. An outreach program is planned, along with a WWW Web Site homepage, to keep interested parties informed during development.

The individualized HGM approach to determining wetland function, followed by assessment of value and level of regulatory actions required, is preferred by the Clinton Administration over the "high-," "medium-," or "low-value" wetland ranking *a priori* categorization scheme which has been proposed for wetlands in various CWA reauthorization bills [e.g., H.R. 961, S. 851; 104th Cong. (1995)]. There has been no reauthorization to date. When—and if—the wetlands provisions of the CWA are addressed in the 105th Congress, the approach to valuation of wetlands will be a major consideration.

The Tulloch Rule

The issue of what does or does not constitute discharge of dredged or fill materials into a wetland was to have been settled with respect to a concept known as "incidental fallback" under the Clinton plan. Because CWA jurisdiction, and all wetlands regulations arising from it, apply only if there is a discharge of materials into waters (including wetlands) of the United States, any regulated activity must involve such a discharge of dredged or fill materials. Activities such as ditching a wetland in order to drain it had been considered by the Corps to be unregulated as long as the material removed from the ditch was not placed back in the area of the jurisdictional wetland.

The Clinton Administration viewed this as a "loophole that has led to the degradation and destruction of wetlands." To remedy this EPA and Corps issued a final regulation the day after the Clinton plan on August 25, 1993 (58 *FR* 45008). The regulation is known as the Tulloch rule, named for the lawsuit from which it arose. It redefined the term "discharge of dredged material" to include "incidental fallback." Incidental fallback is the minor movement of material occurring during excavation such as dirt that falls off of a shovel or out of a bucket back into the area from which it was removed. Because it is all but impossible to prevent such incidental fallback, activities occurring in a wetland, such as excavation, land clearing, ditching, and channelization, would constitute a discharge of dredged or fill material subject to Section 404 permit requirements. The Clinton plan stated that Congress should amend the CWA to make it consistent with this rulemaking. Further, in a final rule announced on December 13, 1996, (61 *FR* 65874) which issued, reissued, and modified certain NWP's, the Corps made clarifications to the categories of permits in accordance with the President's Wetlands Plan consistent with the Tulloch, or incidental fallback rule. (For a summary of this final rule see EH-41's Issuance, Reissuance, and Modification of Nationwide Permits - Final Notification.)

A recent development, however, has interfered with the Clinton plan and some of the NWP's based on it. On January 23, 1997, the Tulloch rule was overturned by the federal district court in Washington, D.C. In *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267 (D.C. Dist. Ct., 1997), the judge ruled that Congress did not intend to cover "incidental fallback" under Section 404 and that the Tulloch rule, therefore, exceeds the scope of the agencies' statutory authority and is invalid. The court pointed out that the suggestion in the Clinton plan that Congress amend the CWA to make it consistent with the Agencies' rulemaking was not determinative; "[t]he executive branch . . . is supposed to administer laws enacted by Congress, not, in effect, to legislate and then seek ratification of its action by Congress." (*Id.* at footnote 20).

As a result of the judge's ruling that the Corps and EPA acted illegally when they adopted the Tulloch rule as a regulation, no permits will be required for excavation, land clearing, channelization, or ditching in wetlands if the only discharge is incidental fallback. The Corps and EPA have stated that they disagree with the court's decision, and the government has filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia. In the meantime, however, for activities which involve only incidental fallback, no Section 404 permits, nationwide or otherwise, will be required, and no administrative or judicial enforcement actions will be taken. (See <http://wetland.usace.mil/tulloch.html> for latest Corps' Tulloch rule guidance.)

Several of the NWP's adopted in December 1996 are affected by the overturn of the Tulloch rule. Nationwide Permit 18, Minor Discharges, for instance, requires that the discharge not cause the loss of more than 1/10 acre of wetlands; now, if the discharge consists solely of incidental fallback, there is no limit on the loss of wetlands, and not even the NWP would be required. Similarly, Nationwide Permit 26, Headwaters and Isolated Waters Discharges, limits loss of waters of the United States (including wetlands) and associated stream bed to certain specified amounts. If such loss is due solely to incidental fallback, it is no longer regulated. Likewise, activities which can be carried out involving only the discharge of incidental fallback materials—such as some activities under NWP's 30, Moist Soil Management for Wildlife, and 31, Maintenance Dredging of Existing Basins—are not regulated by Section 404.

Developments in Wetland Regulations and DOE

No doubt, the overturn of the Tulloch rule and approaches to wetland function and value in general will receive considerable attention when the CWA is ultimately reauthorized by Congress. For DOE, however, the current wetlands controversy is unlikely to have much substantive effect. Its Floodplain/Wetlands Environmental Review Requirements (10 CFR 1022) require minimization of destruction, loss, or degradation of wetlands for any and all activities in wetlands regardless of the nature of the discharge, whether it be significant, incidental, or nonexistent.

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